Supreme Court, U.S.
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No. 09-900

IN THE

Supreme Court of the United States

LINDA ANITA CARTY,

Petitioner,

—v.—

RICK THALER, Director, Texas Department of Justice, Correctional Institutions Division,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The United Kingdom of Great Britain and Northern Ireland respectfully submits this brief as *amicus curiae* in support of granting the petition. Counsel of record for all parties have received timely notice of intent to file this brief under Rule 37.2(a) and have consented to its filing.[1]

Linda Anita Carty, a dual citizen of the United Kingdom and of the Federation of Saint Kitts and Nevis, is on death row in Texas. Her petition challenges her conviction for capital murder and her death sentence based on the violation of her constitutional right to effective assistance of counsel as a result of cumulative errors of trial counsel.

Among these failures was the failure of trial counsel to inform the British Consulate-General in Houston of Ms. Carty's detention or to seek its assistance. Counsel's failure to seek assistance from consular officials was a key component of his ineffectiveness and undermined the overall fairness of Ms. Carty's trial. *See* Pet. 7 & n.3; Pet. 33-34.

The United Kingdom takes very seriously the denial of consular access to its nationals arrested, detained or incarcerated abroad. A nation's interest in protecting its nationals abroad is at its most compelling when, as here, the life of one of its citizens is at

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

risk. In recognition of the invaluable assistance that consular officials can provide, the United States and the United Kingdom have agreed, by a bilateral treaty ratified by both parties, to notify the appropriate consular officials whenever a national of one country is confined in prison awaiting trial or otherwise detained in custody in the other. Convention on Consular Officers, U.S.-U.K., June 6, 1951, art. 16(1), 3 U.S.T. 3426, 3439 [hereinafter Bilateral Consular Convention].

In Ms. Carty's case, Texas authorities failed to comply with the obligation under the Bilateral Consular Convention to notify British consular authorities of her detention. Ms. Carty's trial counsel made no attempt to correct that failure. Had Ms. Carty's trial counsel sought the Consulate's assistance in time, crucial evidence that was directly responsive to the prosecution's characterization of Ms. Carty at trial and sentencing could have been presented to the jury.

The United Kingdom submits this brief to assist the Court in understanding the significance of consular assistance in this case and the effect of counsel's failure to seek consular assistance on Ms. Carty's trial. The United Kingdom respectfully submits that, in view of the importance of these issues, the case warrants this Court's review.

SUMMARY OF ARGUMENT

In evaluating whether Linda Carty received effective assistance of counsel, the United States Court of Appeals for the Fifth Circuit failed to give adequate consideration to the failure of trial counsel to seek consular assistance. Consular assistance is interna-

tionally recognized as both an essential element of due process and an indispensable guarantee of other due process rights, including the fundamental right to an effective defense. In recognition of the importance of these rights, the United States and the United Kingdom agreed in the Bilateral Consular Convention that each of them must notify consular officials of the other promptly upon an arrest of one of its nationals, irrespective of that individual's wishes.

Detained foreign nationals suffer from discrete and particular vulnerabilities that consular assistance seeks to redress, and the mandatory notification requirement enables consular officials to provide support to the detained national from the earliest phase of the proceedings. Consular officers can act as a cultural bridge between the national and counsel, thus enabling the national to communicate openly and helping counsel to be fully aware of circumstances that warrant further investigation. Consular officers can also act to facilitate access to legal and investigative assistance.

In capital trials, this Court has recognized that counsel has an obligation to conduct a thorough investigation into the accused's prior life experiences, character and mental state in order to present compelling evidence in the defense of that individual, both during trial and sentencing. In the case of a foreign national, such investigations are often only possible with the logistical and political support of consular officials. Failure to take advantage of such assistance where available is inconsistent with fundamental principles of effective assistance of counsel. The Fifth Circuit recognized that trial counsel erred in not

seeking consular assistance and that such assistance would have produced evidence in Ms. Carty's favor, but it failed to recognize that that error, considered together with counsel's other failures, was prejudicial.

British consular officers provide extensive support in pretrial proceedings in capital cases involving their nationals. British consular officers commonly facilitate the involvement of dedicated legal and investigative experts, to ensure that all appropriate steps are taken to gather evidence and afford the defendant an adequate defense at trial and sentencing. At the time Ms. Carty was arrested, it was the practice of British consular officers to collaborate in the provision of this assistance with Reprieve, an organization providing substantial legal and investigative support to British nationals facing the death penalty.

Following Ms. Carty's conviction, Ms. Carty's pro bono counsel Baker Botts LLP, with the support of British consular officials and Reprieve, was able to obtain forceful mitigating evidence, including affidavits from top officials in St. Kitts attesting to Ms. Carty's good character and a clinical psychiatric assessment showing a disturbing history of abuse and trauma leading up to the crime at issue. Had trial counsel sought the British Consulate-General's assistance prior to trial, this crucial evidence, which was directly responsive to the prosecution's characterization of Ms. Carty at trial and sentencing, could have been presented to the jury and could have made a difference in the outcome of Ms. Carty's trial.

The failure to seek consular assistance was only one of the failures of Ms. Carty's trial counsel, but it

was a crucially important one. The question of how to analyze the cumulative effect of failures such as this one together with other errors of counsel raises a question of systemic importance to the criminal justice system, warranting this Court's review.

ARGUMENT

I.

THE PROTECTION OF NATIONALS DETAINED ABROAD IS A CORE CONSULAR FUNCTION THAT CAN BE VITAL TO PRESERVING THE RIGHT TO A FAIR TRIAL.

In denying Ms. Carty's request for habeas relief, the Fifth Circuit failed to consider the assistance that the British consulate could have provided, and it barely mentioned the assistance available from the St. Kitts consulate. Neither did the Court consider the cumulative effect of the failure to seek consular assistance, taken together with trial counsel's other failures, on Ms. Carty's right to effective assistance of counsel. *See* Pet. 7 & n.3; Pet. 33-34. In failing to give adequate weight, or any weight, to the importance of consular assistance, the Fifth Circuit overlooked the vital and internationally recognized role that consular assistance plays in protecting individuals caught up in a foreign nation's criminal justice system.

A. The United States and Other Nations Have Long Recognized That Consular Assistance Can Be Crucial in Ensuring a Fair Trial to Individuals Charged with a Crime in a Country Other Than Their Own.

The United States and the United Kingdom have long been actively involved in the protection of the

rights of their respective nationals abroad. Like many other nations around the world, they have long recognized that consular officials play a crucial role in providing that protection, and that the need for consular assistance is at its greatest when an individual is arrested or detained in a foreign country. As the U.S. Department of State explains in its manual for U.S. foreign service officers:

> Our most important function as consular officers is to protect and assist private U.S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail.

7 U.S. Dep't of State, FOREIGN AFFAIRS MANUAL § 412 (Sept. 1, 2004).

Individuals arrested in a foreign country often face obstacles of culture, fears of deportation, unfamiliarity with the criminal justice system and isolation from their family, friends and community. Consular officers can provide numerous forms of assistance to their nationals to assist them in receiving fair and equal treatment when charged with crimes abroad. *See, e.g., Ledezma v. State*, 626 N.W.2d 134, 152 (Iowa 2001).

Among other things, consular officers may assist the detainee in obtaining appropriate legal representation, including through facilitating the assistance of pro bono lawyers and, in capital cases, investigators. In addition, as this very case demonstrates, *see infra* Part II(B), consular officials can facilitate the gath-

ering of documentary evidence and help in locating witnesses in the national's home jurisdiction that are necessary to the foreign national's defense and would otherwise be inaccessible to defense counsel. It is widely recognized internationally that the availability of consular notification and access can be vital to ensuring a fair process for individuals charged with a crime in a country other than their own.[2]

The mere existence of defense counsel does not guarantee that the defendant has meaningful and effective legal representation. Particularly in a capital case, consular notification and assistance can help a foreign national receive the meaningful and effective legal representation on which her life frequently depends, and which standards of due process common to the United States and other Western democracies demand.

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[2] *See, e.g.*, Advisory Opinion OC 16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-Am. Ct. H.R. (Ser. A) No. 16, ¶ 122 (Oct. 1, 1999) (consular assistance forms part of "the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial"); *id.* ¶ 137 (for a foreign national, proceeding to trial without consular assistance is "prejudicial to the guarantees of ... due process of law"); Eur. Comm'n, *Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union*, COM(2004) 328 final, ¶ 7 (April 28, 2004) (consular notification and assistance are "safeguards to protect [the] fundamental rights" of foreign nationals accused of a crime).

B. The Bilateral Consular Convention Reflects the Mutual Recognition by the United States and the United Kingdom of the Importance of Consular Notification.

In 1951, the United States and the United Kingdom signed, and the following year ratified, the Bilateral Consular Convention, which codified the long-recognized customary rights of consular officers to assist their respective nationals abroad. Among other things, the Bilateral Consular Convention grants consular officers of each of the two countries the right "to visit without delay, to converse privately with and to arrange legal representation for, any national" of the respective country who is confined awaiting trial or otherwise detained. Bilateral Consular Convention, *supra*, art. 16(1). More generally, the Convention authorizes consular officials to "assist any ... national in proceedings before or in relations with the authorities of the territory, and, where necessary, arrange for legal assistance for him." *Id.* art. 15(3).

To ensure that consular officials may effectively exercise these rights, the Convention requires that "[a] consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody." *Id.* art. 16(1). The Bilateral Consular Convention requires immediate notification of the consulate regardless of whether the detained national requests it. *See id.* art. 16(1). In this respect, the Bilateral Consular Convention differs from the multilateral Vienna Convention on Consular Relations, which requires notification of the consulate only if the detained indi-

vidual requests it. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 101.

By requiring mandatory notification, the Bilateral Consular Convention emphasizes the importance of this notification not just to the detained individual but also to the State of which that individual is a national. Moreover, a detained individual, notified of the availability of consular assistance by local police or courts, may not understand the nature or extent of the assistance that the consulate can provide. By making notification mandatory in all cases, the Bilateral Consular Convention ensures that consular officials can inform the detained individual of the resources that are available.

The United Kingdom has also recognized the importance of consular notification for foreign nationals detained within its own legal system. The United Kingdom has enacted detailed regulations to ensure that obligations of consular notification are respected. In particular, Code C issued by the U.K. Home Secretary under the Police and Criminal Evidence Act 1984 (PACE) requires the police to contact the embassy or consulate of every detained foreign national when required by a bilateral consular convention. Police and Criminal Evidence Act 1984 (Code of Practice C and Code of Practice H) Order 2006, S.I. 2006/1938, Code C, § 7.2 (U.K.). The Code specifically notes that the United States is one of the countries with which the United Kingdom has a bilateral agreement requiring mandatory notification whenever one of its nationals is detained. *Id.*, Code C, Annex F. The Court of Appeal for England and Wales

has held that a serious breach of PACE Code C raises a presumption that "prima facie at least the standards of fairness set by Parliament have not been met." *R. v. Walsh*, 91 Crim. App. 161, 163 (C.A. 1989) (Eng.).

The United States, for its part, has treated consular conventions as self-executing law under Article VI of the U.S. Constitution, and therefore immediately binding on federal, state and local officials without the need for any implementing legislation. U.S. Dep't of State, *Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* 44 (2003). Reflecting the terms of the Bilateral Consular Convention, the U.S. State Department has instructed federal, state and local police officials that the United Kingdom is a "mandatory notification" country, *id.* at 49—in other words, that "the nearest consular officials *must* be notified of the arrest or detention of a [British] national, **regardless of the national's wishes**," *id.* at 3 (emphasis in original); *see also id.* at 14.

The failure of the United States to comply with that direction in this case constitutes a breach of the rights of the United Kingdom under the Bilateral Consular Convention. Under international law, the breach of that obligation requires the United States to provide a remedy that will appropriately reflect the material assistance the exercise of those rights would have brought to Ms. Carty. *See* U.N. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83 Annex,

art. 35, U.N. Doc. A/RES/56/83 (Dec. 12, 2001); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 901 cmt. d (1987).[3]

C. Particularly in a Capital Case, Failure to Take Advantage of Consular Assistance Is Inconsistent with Effective Assistance of Counsel.

Consular assistance can play a vital role in facilitating the gathering of evidence in capital cases, and particularly mitigation evidence at the penalty phase. Given this vital role, the right to effective assistance of counsel necessarily requires that defense counsel know about, and take advantage of, the assistance that a detained national's consulate can provide.

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[3] Unlike the Vienna Convention on Consular Relations, the Bilateral Consular Convention does not contain a provision that rights under the convention must be exercised in accordance with domestic law, which this Court construed to operate as a limitation on available remedies under the Vienna Convention. *Compare* Bilateral Consular Convention, *supra*, arts. 15-16, *with* Vienna Convention on Consular Relations, *supra*, art. 36(2). *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006) (holding that Vienna Convention art. 36(2) permitted application of domestic-law procedural-default rules); *cf. Medellín v. Texas*, 552 U.S. 491, 509 (2008) (holding that U.N. Charter art. 94 provided sole remedy for violation of International Court of Justice judgment under Vienna Convention's Optional Protocol). And in any event, United States domestic law allows for a remedy in the circumstances of this case, including, at a minimum, habeas corpus relief for ineffective assistance of counsel. *See Sanchez-Llamas*, 548 U.S. at 364 n.3 (Ginsburg, J., concurring in the judgment).

Where, as here, the state failed to notify the consulate of the defendant's arrest and detention, it necessarily falls to defense counsel, who is meant to look out for the interests of his or her client, to remedy the deficiency. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006) ("If [a defendant] raises [a consular notification] violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance.").

On that basis, a number of courts in the United States have recognized that a conviction may be reversed for ineffective assistance of counsel where trial counsel has failed to take advantage of the benefits of consular assistance. For example, in *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002), Oklahoma's highest court in criminal matters held that a Mexican national's claim directly under the Vienna Convention on Consular Relations was procedurally defaulted, but nonetheless overturned petitioner's conviction on the ground that defense counsel was ineffective, in part because he took the case to trial without seeking the assistance of consular officials of the defendant's country. *Valdez,* 46 P.3d at 710-11. The court remarked:

> We cannot ignore the significance and importance of the factual evidence discovered [after trial] with the assistance of the Mexican Consulate. It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner's defense,

> and provided resources to ensure that he received a fair trial and sentencing hearing.

Id. at 710.

In *Ledezma v. State*, 626 N.W.2d 134 (Iowa 2001), the Iowa Supreme Court found trial counsel ineffective, in part because counsel failed to investigate and present potentially exculpatory evidence, and ordered a new trial. The court noted that trial counsel had failed to avail himself of consular assistance:

> When representing a foreign national criminal defendant, counsel has a duty to investigate the applicable national and foreign laws. ... [A]ll criminal defense attorneys representing foreign nationals should be aware of the right to consular access ... and should advise their clients of this right. Criminal defense attorneys are not equipped to provide the same services as the local consulate. ... [C]onsular access may very well make a difference to a foreign national, in a way that trial counsel is unable to provide.

Id. at 152 (citations omitted); *see also United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 980 (N.D. Ill. 2002) (finding defense counsel ineffective in case where state violated defendant's right to consular notification); *cf. Sanchez-Llamas*, 548 U.S. at 364 n.3 (Ginsburg, J., concurring in the judgment) (noting that defendant could have "rais[ed] an ineffective-assistance-of-counsel claim predicated on his trial counsel's failure to assert the State's violation of [his] rights" to consular notification).

Consistent with the views of these courts, both the American Bar Association and the State Bar of Texas have issued standards recognizing the duty of capital defense counsel to advise their clients of the availability of consular assistance. The ABA's guidelines for counsel in capital cases make clear that "counsel representing a foreign national should ... immediately advise the client of his or her right to communicate with the relevant consular office," and that "counsel should also give careful consideration to the assertion of any legal rights that the client may have as a result of any failure of the government to meet its treaty obligations." ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.6 (rev. ed. 2003) [hereinafter ABA Guidelines]. In a recent resolution, the ABA House of Delegates reiterated the importance of criminal defense attorney's "work[ing] to ensure effective exercise of [consular] rights by foreign national defendants" including by "complying fully with ABA Guideline 10.6." ABA House of Delegates Resolution No. 104 of 2010, at 5 (adopted Feb. 2010).

The Commentary to the ABA Guidelines also makes clear the importance of consular officers in "arrang[ing] for their nationals' legal representation and to provide a wide range of other services. These include ... enlisting the diplomatic assistance of their country to communicate with the State Department and international and domestic tribunals (*e.g.*, through amicus briefs), assisting in investigations abroad, providing culturally appropriate resources to explain the American legal system, arranging for con-

tact with families and other supportive individuals." *Id.* at 74.

The State Bar of Texas, in its guidelines articulating the "statewide standard of practice for the defense of capital cases," similarly calls on counsel representing a foreign national to "[i]mmediately advise the client of his or her right to communicate with the relevant consular office." State Bar Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 Tex. Bar J. 966, 967, 971 (2006) [hereinafter Texas Bar Guidelines]. Counsel in Ms. Carty's case completely failed to comply with these duties.

II.

HAD CONSULAR OFFICIALS BEEN NOTIFIED OF MS. CARTY'S ARREST, DETENTION AND TRIAL, THEY WOULD HAVE PROVIDED SUBSTANTIAL ASSISTANCE.

A. As a Matter of Policy and Longstanding Practice, British Consulates Provide Assistance to British Nationals Accused of Crimes Overseas.

For many decades, British consular officers have been dedicated to providing assistance to British nationals incarcerated abroad. The United Kingdom monitors the cases of British nationals facing the death penalty abroad particularly closely and is committed to assisting British nationals facing capital charges in the United States and elsewhere, including helping them to obtain a fair trial.

The U.K. Foreign and Commonwealth Office (FCO), which is the U.K. counterpart to the U.S. Department of State and oversees the United King-

dom's consulates throughout the world, is strongly committed to "do[ing] everything that [it] appropriately can to prevent the death penalty from being sought or carried out" against British nationals. *Death Penalty Cases (British Citizens)*, 424 Parl. Deb., H.C. (6th Ser.) (2004) at 132WH (statement of Mr. Chris Mullin, then Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs). In a February 2001 statement to Parliament, the British Government made clear its policy "to make representations at whatever stage and level is judged appropriate from the moment that imposition of the death penalty on a British national becomes a possibility." *Id.* at 131WH. This policy, having recently been announced in Parliament, would have been at the forefront of consular officials' thinking in 2001. In October of 2001, the FCO formally launched the Pro Bono Lawyers Panel, which brings together some 35 lawyers who are experts in a number of areas, including human rights and criminal law. Members of the Panel can assist British nationals facing trial overseas where there are human rights concerns, including cases in which British nationals are facing the death penalty. Panel members are currently assisting, or have previously assisted, British nationals facing capital charges or execution in countries such as the United States, Sierra Leone, Nigeria, Ghana and Pakistan.

When British nationals are arrested and charged, particularly with capital crimes, British consular officers can, where appropriate, help ensure that the defendants understand the U.S. criminal justice system, monitor judicial proceedings, lobby prosecutors

not to seek the death penalty, and facilitate communications between detained nationals and their family members. R. 192-93, ¶¶ 7, 9, 10; *Death Penalty Cases (British Citizens)*, *supra*, at 131WH. The British Consulate can also help to ensure that detained nationals in capital cases have appropriate legal representation. In such cases, where the detainee has legal representation, the Consulate can provide appropriate assistance to counsel, which may include referring the case to pro bono lawyers and investigators. R. 193, ¶ 8.

Since at least 2001, the FCO also has worked closely with Reprieve, a non-profit organization that provides substantial assistance to indigent persons facing the death penalty in the form of legal expertise, investigative assistance and support.

Reprieve seeks to make its pretrial involvement in cases as extensive as the case requires to ensure the highest standards of capital representation for the defendant, which includes engaging experienced pro bono counsel to ensure adequate legal representation, seeking out witnesses relevant to both the conviction and sentencing phases of trial, and, where necessary, conducting overseas investigations in the detainee's home country to gather mitigation evidence which would otherwise be missing from her defense. At the time Ms. Carty was arrested, it was the practice of the FCO to collaborate with Reprieve in assisting British defendants in death penalty cases.

Through the combined efforts of consular staff, Reprieve, and pro bono lawyers, British consular officers have enhanced the quality of legal representation for their nationals in numerous cases. Reprieve has

had significant involvement in at least four cases at the trial level. The U.K. government has been involved in at least four cases in the United States where British nationals have faced capital charges or been sentenced to death, and subsequently the death penalty was not sought by the prosecution, or was overturned on appeal. According to Reprieve, to date no British national has been sentenced to death in the United States where Reprieve had been notified and therefore was able to intervene at the trial level.

B. Consular Involvement Would Have Materially Aided Linda Carty's Defense.

Had it been duly notified, the British Consulate would have facilitated the provision of substantial assistance to Ms. Carty and her counsel prior to and during her trial in 2001 and 2002. R. 193, ¶¶ 8-12. Indeed, once the Consulate became aware of Ms. Carty's case after her conviction and sentence, it approached the District Attorney's office and indicated support for a request to suspend proceedings in order for her lawyers to supplement her state habeas corpus petition. Pet. App. 117a-118a; R. 193, ¶ 12. The British Consulate also liaised with Reprieve, which, through Clifford Chance LLP, facilitated the engagement of new pro bono counsel and assisted in the gathering of important mitigating evidence that the jury had never had an opportunity to weigh before it imposed a sentence of death on Ms. Carty.

1. Consular Officials Would Have Helped Ms. Carty Retain Experienced Pro Bono Attorneys and Investigators to Help Ensure That She Received a Fair Trial.

In order to preserve the defendant's right to due process and a fundamentally fair trial in capital cases, British consular officers provide appropriate assistance to help ensure that British nationals have the means at their disposal to offer an adequate defense against the charges that they face. R. 193, ¶¶ 8, 10.

Upon learning of Ms. Carty's case, the British Consulate collaborated with Reprieve, which secured the participation of her current habeas counsel, Baker Botts, on a pro bono basis, and liaised between the newly-appointed attorneys and Ms. Carty to ensure her full trust and cooperation. R. 193, ¶¶ 8, 12. Reprieve continues to actively assist Baker Botts LLP with Ms. Carty's case.

The record demonstrates that Mr. Gerald Guerinot, Ms. Carty's lead trial counsel, has a woeful record of representation in capital cases. It has been reported that twenty of the thirty-nine capital defendants represented by Mr. Guerinot through 2007 have been sentenced to death. D. Rose, *Lethal Counsel*, THE OBSERVER, Dec. 2, 2007, at 25 (R. 2716). According to Ms. Carty, defense counsel was assigned by the Court against her wishes, R. 199-200, ¶ 4; Pet. App. 162a-163a, and it appears that Ms. Carty's counsel met with her only once before trial, for fifteen minutes, and that he told her that he had not prepared her defense because of his daughter's wedding. R. 200, ¶ 5. Faced with this information, British consular

authorities and/or Reprieve would have been able to help to ensure that Ms. Carty had appropriate legal representation prior to and during trial by facilitating the assistance of pro bono lawyers, investigators, and experts. R. 193, ¶¶ 8, 12.

2. Consular Officials and Reprieve Would Have Assisted Counsel In Gathering Critical Mitigating Evidence.

Mitigating evidence, often relating to the defendant's background or mental state, serves to humanize the defendant in the eyes of the jury and is an essential component of the defense at the sentencing phase of every capital case. Indeed, armed with such mitigating evidence, consular officials or defense counsel can sometimes persuade prosecutors not to seek the death penalty in the first place. R. 192, ¶ 7. Thus, it is imperative that defense counsel conduct a broad and thorough investigation of the defendant's background, mental condition, and life experiences to gather evidence that militates against the imposition of the death penalty.

As both the ABA and the State Bar of Texas Guidelines for capital defense counsel state,

> [i]n deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following: Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that ... would rebut or explain evidence presented by the prosecutor, would present positive aspects of the cli-

> ent's life, or would otherwise support a sentence less than death.

ABA Guidelines, *supra*, at 104; Texas Bar Guidelines, *supra*, at 974. Capital defense counsel are expected to "[t]horoughly investigate the basis for each potential claim," Texas Bar Guidelines, *supra*, at 972, and affirmatively "seek information that supports mitigation or rebuts the prosecution's case in aggravation," *id.* at 974.

In the case of a foreign national, such investigations are necessarily costly, time-consuming, and logistically complicated because the required investigation may need to take place outside the country. In this case, it is not necessary to guess at what mitigation evidence competent trial counsel could have developed with the assistance of the British Consulate, pro bono lawyers and Reprieve, because it is clear from the record what evidence was available. After Ms. Carty's conviction and death sentence, her new pro bono counsel, with the support of the British Consulate and the assistance of Reprieve, was able to develop substantial mitigation evidence from the former British colony of Saint Kitts and Nevis, where Ms. Carty had spent her formative years, and from a psychiatric expert who demonstrated the existence and relevance of an extreme psychiatric disorder suffered by Ms. Carty at the time of the crime—evidence that her trial counsel had failed to obtain.

This evidence included seventeen affidavits and statements of witnesses, many from prominent citizens of St. Kitts, who were prepared to testify to Ms. Carty's character and who described her as a coura-

geous, religious, community-oriented and highly credible primary school teacher. R. 619, 628, 726, 729, 733-734, 750. The former Prime Minister of St. Kitts described Ms. Carty as "someone who was willing to put herself on the line to improve things ... to help people improve their lives, make the community better and allow young people to have a future," "always willing to help people" and "a very active worker in her community." R. 498. This evidence also established the belief of many of these witnesses that an act such as murder would be completely out of character for Ms. Carty. R. 585, 619, 629, 716-717, 719.

With the support of the Consulate, Reprieve also could have assisted in obtaining medical and school records that would have explained Ms. Carty's vulnerabilities, could have helped the jury understand her state of mind at the time of the crime that she was accused of committing, and undermined the prosecution's portrayal of her dangerousness. With the support of the Consulate and the assistance of Reprieve, Ms. Carty's pro bono counsel obtained an expert psychiatric report that recited acts of extreme violence and sexual degradation that Ms. Carty suffered at the hands of a boyfriend. R. 2411-2412, ¶¶ 13-17. That report also recited that she had been raped while in Houston, she had become isolated from her family as a result of the rape, she had become pregnant from the rape, she chose to bear the child, and she then gave the baby up for adoption. *Id.* ¶¶ 18-23. From these facts, the expert concluded that Ms. Carty suffered from chronic post-traumatic stress disorder. R. 2409-2417, ¶¶ 7, 46-49.

Particularly given the character of the crime for which Ms. Carty was convicted, this evidence would have had a direct bearing on the deliberations of the jury at sentencing. In returning a sentence of death against Ms. Carty, the jury found that the state had proved the statutory aggravating circumstance that "there is a probability that [she] would commit acts of criminal violence that would constitute a continuing threat to society." State Habeas Record 855. The jury also found that, taking into account Ms. Carty's "character and background," there were no mitigating circumstances warranting a refusal to impose death. *Id.* at 856.

But the evidence of Ms. Carty's "character and background" available to the jury was incomplete. Indeed, the Fifth Circuit recognized that trial counsel erred in failing to investigate and present mitigating evidence from witnesses who could have been contacted with consular assistance and who "would have provided a much more nuanced and detailed vision of Carty's life and contributions to the St. Kitts community" and "given more detail and more focus to the mitigating evidence[.]" Pet. App. 42a. The prosecution's case on punishment depended on a portrayal of Ms. Carty as a person who "lived a life of lawlessness," based on her recent life in Texas. Pet. App. 96a. Not only could Reprieve have, with the support of consular officials, provided precisely the type of character evidence that could have rebutted the prosecution's case, but had they been notified in a timely manner, they could have enabled trial counsel to present Ms. Carty's severe psychiatric affliction as relevant mitigating evidence.

The district court, in dismissing the persuasive force of this evidence, expressly held that Ms. Carty had failed to present a link that could explain the "disconnect" between her life in St. Kitts and that in Texas. Pet. App. 195a. To the contrary, the diagnosis and evidence assembled by the psychiatric expert retained by pro bono habeas counsel—including the physically abusive relationship Ms. Carty suffered in Houston followed by a violent rape and resulting pregnancy—would have provided just that link. R. 2409-2417.

U.S. courts have recognized that where counsel does not present compelling evidence in mitigation and that failure flowed, in whole or in part, from his failure to seek consular assistance, the assistance of counsel is ineffective and the death sentence must be reversed. *See, e.g.*, *Schomig*, 223 F. Supp. 2d at 980; *Valdez*, 46 P.3d at 710; *cf. Ledezma*, 626 N.W.2d at 152. In Ms. Carty's case as in *Valdez*, "[i]t is evident from the record" that the Consulate "would have ... provided resources to ensure that [petitioner] received a fair trial and sentencing hearing," and that "the evidence was not discovered due to trial counsel's ineffectiveness." *Valdez*, 46 P.3d at 710.

Ms. Carty's trial counsel failed to comply with his professional obligation to make use of the resources available to him—including consular assistance—to undertake a thorough investigation. That failure prevented the jury from hearing important and directly relevant mitigation evidence and, together with other failures of trial counsel, undermined the fairness of the proceedings that resulted in a sentence of death for Ms. Carty.

Adequate analysis of the cumulative impact of such failures is necessary to any evaluation of whether a defendant has received effective assistance of counsel. The Fifth Circuit's failure to consider counsel's errors cumulatively, including counsel's failure to seek and pursue consular assistance, presents an important issue of law warranting this Court's review and correction.

CONCLUSION

For the reasons stated above, *amicus curiae* the United Kingdom of Great Britain and Northern Ireland respectfully urges the Court to grant Ms. Carty's petition for a writ of certiorari.

Respectfully submitted,

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